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AZ CORP COMMISSION
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BEFORE THE ARIZONA CORPORATION COMMISSION

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BOB BURNS
COMMISSIONER

TOM FORESE
COMMISSIONER

ANDY TOBIN
COMMISSIONER

IN THE MATTER OF THE) DOCKET NO. E-01575A-15-0312
APPLICATION OF SULPHUR)
SPRINGS VALLEY ELECTRIC)
COOPERATIVE, INC., FOR A)
HEARING TO DETERMINE THE) THE ENERGY FREEDOM COALITION
FAIR VALUE OF ITS PROPERTY) OF AMERICA'S RESPONSE TO
FOR RATEMAKING PURPOSES, TO) SSVEC'S MOTION TO COMPEL
FIX A JUST AND REASONABLE) RESPONSES TO SSVEC'S FIRST SET
RETURN THEREON, TO APPROVE) OF DATA REQUESTS
RATES DESIGNED TO DEVELOP)
SUCH RETURN AND FOR RELATED)
APPROVALS.)

The Energy Freedom Coalition of America ("EFCA"), through its undersigned counsel, hereby submits its Response to Sulphur Springs Valley Electric Cooperative, Inc.'s ("SSVEC") Motion to Compel Intervenor Energy Freedom Coalition of America's Responses to SSVEC'S First Set of Data Requests ("Motion").

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Through its Data Request¹, SSVEC is impermissibly demanding information not from EFCA, but from EFCA's individual members who are not parties to this docket. In short, EFCA

¹ SSVEC's Data Request contained 18 specific requests, 13 of which EFCA objected to for the reasons described herein. For purposes of this Response, "Data Request" shall refer to only the 13 requests for information that EFCA objected to, unless otherwise stated herein.

1 does not have this information and, therefore, cannot provide it under any circumstances.
2 Moreover, SSVEC's suggestion EFCA can simply "ask for the information" from its members is
3 wholly inappropriate and unjustified, and SSVEC provides no authority to suggest that a trade
4 association is required to produce information in the possession or control of its members or even
5 a duty to ask its non-party members to respond to information requests in a rate case.

6 Aside from the fact that EFCA does not have the information described in SSVEC's Data
7 Request (some of which SSVEC already has), the information is not relevant, not reasonably
8 calculated to lead to the discovery of admissible evidence, unreasonably vague, and is unduly
9 burdensome. In this case, all of the evidence EFCA advances or relies upon is publicly available,
10 and the testimony of EFCA's witness also relies on only publicly available information.

11 Further the information SSVEC described in its Data Request is the confidential and
12 proprietary business information of its non-party individual members, the disclosure of which
13 would give SSVEC an unfair competitive advantage over the responding parties.

14 Finally, SSVEC's demand that the members of associations and industry groups that
15 intervene at the Commission should themselves be exposed to direct discovery despite being non-
16 parties would, if granted, have consequences that would ripple through numerous dockets and
17 could even impact SSVEC's own members. Commission dockets are replete with industry and
18 association groups that intervene from time to time including, but not limited to, Arizonans for
19 Electric Choice and Competition ("AECC"), the Arizona Association of Realtors ("AAR"), the
20 Arizona Competitive Power Alliance ("ACPA"), the Arizona Utility Ratepayer Alliance
21 ("AURA"), AARP, various homeowners associations ("HOAs"), and countless others. If
22 SSVEC's Motion to Compel is granted then the next time that an HOA argues that a rate increase
23 will harm its members, the utility would be permitted to demand and receive disclosure of
24 confidential tax records and bank statements from the individual impacted members to try and
25 demonstrate that a rate increase will not be financially harmful. This new paradigm at the
26 Commission would chill intervention and give utilities incredible power to see confidential
27 information. The result of this new paradigm would be a violation of EFCA members' rights to
28 association and privacy.

1 **II. ARGUMENT**

2 **A. SSVEC Seeks Information From Non-Parties; EFCA Does Not Have The**
3 **Information Sought.**

4 SSVEC readily acknowledges that EFCA does not have the information described in its
5 Data Request. SSVEC's argument in its Motion, however, is that EFCA can simply "ask its
6 members" to produce the information it seeks. As EFCA's individual members are not parties to
7 this case, the unreasonableness and impropriety of SSVEC's Data Request cannot be overstated.
8 Additionally, SSVEC cites no authority for its argument that a member association can be
9 compelled to produce information in the possession and control of its non-party members.

10 SSVEC's Data Request is similar to discovery requests served upon member institutions
11 of the National Collegiate Athletic Association ("NCAA") in *University of Texas at Austin v.*
12 *Vratil*.² In overturning the district court's ruling, the Tenth Circuit Court of Appeals held the
13 district court erred inappropriately characterized the unserved, non-party member institutions of
14 the NCAA as "real properties in interest" for discovery purposes.³ The Court also stated that the
15 Federal Rules provide a clear-cut procedure for obtaining responses to interrogatories from an
16 association such as the NCAA, and that such rules provide that "interrogatories may only be
17 directed to a party to an action" or that party's officer or agent.⁴

18 In the event the officer or agent fails to respond, enforcement of the court's orders
19 regarding discovery is obtained under Rule 37, which, notably, contains no
20 procedure for requiring responses from unserved, nonparty members of the
21 association.⁵

22 Here, like the member institutions of the NCAA in *Vratil*, EFCA's individual members are
23 not parties to this case, or real parties in interest for discovery purposes. EFCA, like the NCAA, is
24 a separate and distinct organization from its individual members. Similarly, the rules of procedure
25 in Arizona applicable to this case provide a clear-cut procedure for obtaining responses to

26 ² 96 F.3d 1337 (10th Cir. 1996).

27 ³ *Vratil*, 96 F.3d 1337 at 1340.

28 ⁴ *Id.*

⁵ *Id.* (emphasis added).

1 discovery requests from associations, like EFCA. However, there is no procedure for requiring
2 responses from EFCA's unserved, nonparty members.

3 Presumably, EFCA is not the only organization that would object to a request for
4 information from its unserved, non-party members. Virtually any association would similarly
5 object to such a request, including SSVEC. In fact, SSVEC served a similar discovery request
6 upon Intervenor, the Arizona Solar Energy Industry Association ("AriSEIA") and that industry
7 group responded that it does not have the records that SSVEC has sought. Upon information and
8 belief, SSVEC has not filed a Motion to Compel against AriSEIA despite it taking the exact same
9 position as EFCA in this case.

10 **B. The Information Described in SSVEC's Data Request Is Not Relevant.**

11 SSVEC cites to the pre-filed testimony of witness Mark Fulmer ("Mr. Fulmer") to suggest
12 that its Data Request seeks information "directly relevant" to Mr. Fulmer's testimony. SSVEC
13 argues that because Fulmer's testimony relates to the economic impact of the rate proposals on
14 DG customers, SSVEC is entitled to information from EFCA's individual members about what
15 each member charges its customers, the fees involved, costs of equipment, profits, rate of return,
16 etc. However, the information SSVEC seeks from EFCA's non-party members is not relevant
17 because none of the requested information is at issue in this case and EFCA has not relied on any
18 such information in its testimony.

19 To be clear, in Mr. Fulmer's testimony, he exclusively uses information provided by Staff,
20 SSVEC, the Lawrence Berkley National Laboratory ("LBNL"), and the National Renewable
21 Energy Laboratory ("NREL") to calculate the estimated financial impacts and implications that
22 SSVEC's proposal will have on customers considering the implementation of DG solar.
23 Importantly, Mr. Fulmer's analysis relies only on publicly available information and information
24 provided by the utility or Commission Staff and focuses on the impact on the customer's financial
25 decision. Mr. Fulmer did not utilize a single shred of information provided by EFCA members in
26 performing his modeling.

1 Mr. Fulmer clearly testifies that he utilizes a model that was developed by various parties
2 in the UNSE Rate Case proceeding including modeling generated by Staff.⁶ Mr. Fulmer indicates
3 that he uses SSVEC's own rates in creating his model.⁷ Then he uses SSVEC witness Hendrick's
4 estimates for system size and approximate output⁸ as informed by information from NREL's online
5 tool, PV Watts.⁹ Mr. Fulmer testifies that he used operation and maintenance costs derived from
6 an NREL document entitled "Distributed Generation Renewable Energy Estimation of Costs" and
7 provides a link to that document in his testimony.¹⁰ Mr. Fulmer testified that he derived his
8 estimate of system costs directly from a study released by LBNL and cited to this study in his
9 testimony as well.¹¹ Finally, in support of his opinions regarding lease rates, Mr. Fulmer testifies
10 that he utilizes Staff witness Mr. Liu's assumptions to inform the lease rate he uses to model.¹²

11 EFCA neither relies on any of the information requested by SSVEC, nor has it put any of
12 its member's financial information at issue in this case. Therefore, the information described in
13 SSVEC's Data Request is not reasonably calculated to lead to the discovery of admissible evidence
14 and unreasonably burdensome¹³ because it will not be relevant to the issues that will be addressed
15 at the hearing, e.g., the testimony presented by Mr. Fulmer.

16 **C. SSVEC's Data Request Seeks Confidential Information From EFCA's Non-**
17 **Party Members**

18 SSVEC argues that EFCA's non-party members should have to respond to its Data
19 Requests so that discovery will not be a "one-way street." SSVEC's argument is based on the
20 flawed premise that EFCA's members are parties to this case. They are not. EFCA has provided
21 all of the information is has in its possession in response to the Data Request. Moreover, EFCA
22

23 ⁶ See Fulmer Direct, at 16:8-11.

24 ⁷ See *Id.* at 16:11-13.

25 ⁸ See *Id.* at 16:18-19.

26 ⁹ See *Id.* at 16:20-21.

27 ¹⁰ See *Id.* at 17:3-4.

28 ¹¹ See *Id.* 17:6-7.

¹² See *Id.* 17 at Fn. 28.

¹³ SSVEC concedes that, with respect to 1.1 of its Data Request, SSVEC has this information already in its possession. SSVEC argues, however, allegedly have to search through 1400 files to obtain the information, it would be easier for EFCA to ask its members for the information. Aside from the fact that SSVEC cannot compel EFCA's individual members to respond to any discovery request, EFCA intervened in this case in January, 2016. SSVEC did not submit its Data Request until the end of April, during which it could have easily compiled the information requested.

1 has not asked SSVEC for information from its individual members. Therefore, discovery in this
2 matter has not been one-sided.

3 This is SSVEC's rate case. SSVEC has the burden of showing that its rates are just and
4 reasonable. There is nothing unjust or unreasonable about a provider in a rate case producing
5 information related to its rates. Unlike SSVEC, EFCA is not a provider and has no customers. It
6 does not set rates, charge fees, or install systems.

7 In addition to this case, there are at least six rate cases pending before the Arizona
8 Corporation Commission, all of which propose a rate design that would render roof top solar
9 economically inefficient. Electric utility providers admit that they are in direct competition with
10 the roof top solar industry. Information about a non-party EFCA member's sales, installations,
11 leases, fees, profits, rates of return, and cost calculations are both confidential and proprietary. If
12 SSVEC had this information, it and other electric utility providers could design a rate specifically
13 structured to destroy both the consumer's economic benefit derived from rooftop solar. To require
14 EFCA's non-party members to provide the information described in the Data Request would place
15 those members in a severely disadvantaged position with respect to SSVEC and other electric
16 utility providers.

17 **D. Granting SSVEC's Request Would Chill Participation At The Commission**

18 Industry and ratepayer associations commonly intervene in matters in front of the
19 Commission. EFCA is unaware of any precedent whereby a non-party has been forced to provide
20 proprietary and confidential information in response to a discovery request merely because such
21 non-party is a member of an intervening organization. The opportunities for mischief are plenty
22 and the propensity to chill intervention at the Commission is real if such a policy should be
23 adopted.

24 Should utilities be permitted discovery on the members of AARP in order to review their
25 private tax returns or bank statements to gage the true impact of a rate increase on their disposable
26 income in a case where AARP is fighting an increase? Should the Arizona Association of
27 Realtors® be made to disclose each member's commission structure and annual income simply
28 because AAR alleges a rate change will harm home sales in Arizona?

1 Should EFCA perhaps be permitted to request that SSVEC provide responses from some
2 or all of its residential ratepayers (members of the Cooperative) to substantiate claims that SSVEC
3 makes in its testimony regarding the positions of its members? For example, SSVEC CEO, Mr.
4 Huber claims that “SSVEC’s members have clearly expressed a preference for utility-scale solar
5 projects....”¹⁴ Certainly, EFCA believes this claim to be dubious, but should EFCA be able to
6 serve SSVEC with Data Requests that single out individual Cooperative members and ask that
7 they respond indicating whether they agree or disagree with this statement?

8 In a similar situation before the Oklahoma Public Service Commission, the Commission
9 held that a utility’s data requests to members of an association were not discoverable¹⁵ after parties
10 argued that divulging such information would set a dangerous precedent because it would chill
11 participation in rate-related proceedings by voluntary associations and trade organizations and it
12 would also have chilling effect on the First and Fourteenth Amendment associational rights of
13 members.¹⁶

14 Support of litigation is a form of expression and association protected by the First and
15 Fourteenth Amendments, referred to as Associational Privilege.¹⁷ Compelled disclosure could
16 have a chilling effect on such support. Oklahoma’s holding is an acknowledgement of and
17 application of this right at the state level within an administrative proceeding.

18 Further, EFCA’s members have a right to association and a right to privacy that would be
19 violated as a result of this new paradigm.¹⁸

20 **E. SSVEC’s Arguments About Timing Are Unpersuasive**

21 SSVEC served the discovery requests at issue on EFCA three months after EFCA
22 intervened in this matter and just three weeks before the hearing. SSVEC’s delay in making these

23 ¹⁴ Direct Testimony of Creden Huber, at 10:16-17.

24 ¹⁵ Application of Joyce E. Davidson Director of the Public Utility Division, Oklahoma Corporation Commission, for
a review of the Fuel Adjustment Clause of Public Service Company of Oklahoma for the Year 2011, Cause No.
PUC 200200754, Order (Feb. 28, 2005).

25 ¹⁶ OIEC’s Response to PSO’s Appeal of ALJ Report, Cause No. PUC 200200754 (Mar 1, 2004).

26 ¹⁷ In *Beinin v. Center for Study of Popular Culture* (citing the 1958 *NAACP v. Alabama ex rel. Patterson*), the court
denied a motion to compel discovery because “support of litigation is a form of expression and association protected
by the First Amendment.” The court concluded that ompelled disclosure could have a chilling effect on such
27 support.

28 ¹⁸ See *Britt v. Superior Court*, 20 Cal. 3d 844 (1978); *Goold v. Hilton Worldwide, Inc.*, 2014 U.S. Dist. LEXIS
48652, 2014 WL 1383252 (E.D. Cal. Apr. 8, 2014); & *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 78 S. Ct.
1163, 2 L. Ed. 2d 1488, 1958 U.S. LEXIS 1802 (U.S. 1958).

1 requests renders the Cooperative's claim that EFCA is "stonewalling" SSVEC's efforts to prepare
2 for cross exam unpersuasive.

3 As recounted in the Motion to Compel, the Parties specifically agreed to an extension for
4 EFCA to respond to SSVEC's Data Request. In its Motion, SSVEC argues that it relied on a
5 reasonable belief that because SSVEC was granting an extension to EFCA to respond to the Data
6 Request, EFCA would provide complete answers to all of its requests. First, EFCA's counsel
7 never represented that EFCA would waive its right to object to any portion of the Data Request.
8 Moreover, SSVEC's counsel was aware that at the time of the Data Request, counsel for EFCA
9 was participating in another hearing at the commission. Regardless, the parties agreed to an
10 extension and EFCA timely responded. More importantly, and as described more fully above, even
11 without the extension EFCA does not have the information requested and cannot provide it.

12 **III. CONCLUSION**

13 EFCA has raised no claims or defenses that rely on information provided by or related to
14 any of its members. All claims made by EFCA are based on publicly available information or
15 information received directly from the utility or Commission Staff. SSVEC has access to all the
16 information that EFCA has relied upon and has access to the world of other publicly available
17 information to corroborate or attempt to impeach Mr. Fulmer's conclusions. Therefore, the
18 information requested by SSVEC is not relevant, not reasonably calculated to lead to the discovery
19 of admissible evidence, and is unduly burdensome. The information SSVEC described in its Data
20 Request is the confidential and proprietary business information of EFCA's non-party individual
21 members, the disclosure of which would give SSVEC an unfair competitive advantage over the
22 responding parties. Finally, granting this Motion to Compel would signal a new paradigm at the
23 Commission chilling the ability of associations to intervene of depriving their members of their
24 rights to free association.

25 Therefore, SSVEC's Motion must be denied.

26 //

1 Respectfully submitted this 11th day of May, 2016.

3 /s/ Court S. Rich

4 Court S. Rich
5 Rose Law Group pc
6 Attorney for EFCA

7 **Original and 13 copies filed on**
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